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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

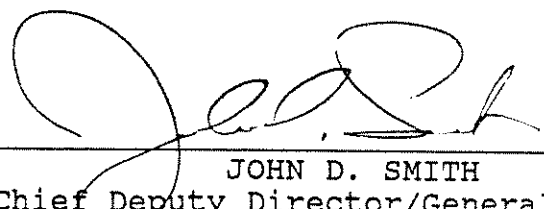
SACRAMENTO, CALIFORNIA

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In re:) 1988 OAL Determination No. 8
Request for Regulatory)
Determination filed) [Docket No. 87-014]
by the California)
Taxpayers' Association) May 25, 1988
concerning County)
Assessors Letter No. 84/51)
("Valuation of Subdivision)
Lots") issued by the State)
Board of Equalization¹)
Determination Pursuant to
Government Code Section
11347.5; Title 1, California
Code of Regulations
Chapter 1, Article 2

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Gordon Young, Staff Counsel
Barbara Eckard, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the State Board of Equalization's County Assessors Letter No. 84/51 ("Valuation of Subdivision Lots") is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the above-referenced County Assessors Letter is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

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THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether the State Board of Equalization's ("Board") County Assessors Letter No. 84/51 ("Valuation of Subdivision Lots")⁴ is a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore in violation of Government Code section 11347.5, subdivision (a).⁵

THE DECISION ^{6,7,8,9}

The Office of Administrative Law finds that the Board's Letter No. 84/51 (1) is subject to the requirements of the Administrative Procedure Act (APA),¹⁰ (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The State Board of Equalization was created by former article XIII, section 9 of the California Constitution of 1879. Language establishing the Board is currently found in California Constitution, article XIII, section 17. The Board is, among other things, charged with administering key features of property tax collection.

Government Code section 15606 sets forth the powers and duties of the Board:

"The State Board of Equalization shall do all of the following:

(a) Prescribe rules for its own government and for the transaction of its business.

(b)

(c) Prescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing, including uniform procedures for the consideration and adoption of written findings of fact by local boards of equalization as required by Section 1611.5 of the Revenue and Taxation Code.

(d) Prescribe and enforce the use of all forms for the assessment of property for taxation, including forms to be used for the application for reduction in assessment.

(e) Prepare and issue instructions to assessors designed to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation. It may adapt the instructions to varying local circumstances and to differences in the character and conditions of property subject to taxation as in its judgment is necessary to attain this uniformity.

(f) Subdivisions (c), (d) and (e) shall include, but are not limited to, rules, regulations, instructions, and forms relating to classifications of kinds of property and evaluation procedures.

(g)

(h)

This section is mandatory." [Emphasis added.]

Property assessment responsibilities are divided between the Board and local county assessors. Revenue and Taxation Code section 721 provides that:

"The board shall annually value and assess all of the taxable property within the state that is to be assessed by it pursuant to Section 19 of Article XIII of the Constitution and any legislative authorization thereunder."
[Emphasis added.]

California Constitution, article XIII, section 19 requires the Board to:

" . . . annually assess (1) pipelines, flumes, canals, ditches, and aqueducts lying within 2 or more counties and (2) property, except franchises, owned or used by regulated railway, telegraph, or telephone companies, car companies operating on railways in the State, and companies transmitting or selling gas or electricity. This property shall be subject to taxation to the same extent and in the same manner as other property. . . ."

Revenue and Taxation Code section 405 provides in part that:

"(a) Annually, the [county] assessor shall assess all taxable property in his county, except state-assessed property"
[Emphasis added.]

Authority 11

Government Code section 15606, subdivision(c), mandates the Board to "[p]rescribe rules and regulations to govern . . . assessors when assessing" Government Code section 15606, subdivision (f), provides:

"(f) Subdivisions (c), (d), and (e) shall include, but are not limited to, rules, regulations, instructions, and forms relating to classifications of kinds of property and evaluation procedures."

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments"12 Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.13

General Background

The following undisputed facts and circumstances have given rise to the present Determination.

A Request for Determination was filed on September 21, 1987 by Richard P. Simpson ("Requester") of the California Taxpayers' Association concerning the State Board of Equalization's County Assessors Letter No. 84/51 ("Valuation of Subdivision Lots"). Letter 84/51, attached as Appendix A to this Determination, was created to

" . . . clarify the proper procedure for assessing newly created subdivision lots prior to sale and the method for handling the street, utility, and land improvements added during the subdivision development stage."14

The Requester alleges that Letter 84/51 is a "regulation" as defined by Government Code section 11342, subdivision (b) and that this "regulation" has not been adopted pursuant to the APA.

No response was filed by the Board.15

II. DISPOSITIVE ISSUES

There are two main issues before us:16

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to both parts of this inquiry is "yes."

Analysis

First, Letter 84/51 is clearly a standard of general application. It directly applies to all county assessors in the state. It also indirectly applies to all subdivision developers and subdivision lot purchasers in the state.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹⁷

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Second, Letter 84/51 implements, interprets, and makes specific the law enforced or administered by the Board--specifically, the California Constitution, article XIII A, sections 1 and 2. Section 1 limits the maximum amount of any ad valorem tax on real property in California. That limitation is based upon a determination of the "full cash value" of such property as follows:

"Section 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on (1) any indebtedness approved by the voters prior to July 1, 1978, or (2) any bonded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition." [Emphasis added.]

The definition of "full cash value" is set forth in section 2 as follows:

"Section 2. (a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under 'full cash value' or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation. . . ." [Emphasis added.]

Letter 84/51 interprets and supplements the term "full cash value" and the phrase "or a change in ownership has occurred after the 1975 assessment" by fixing the time when street and right-of-way improvements change ownership between the subdivision developer and the government entity. Letter 84/51 states in pertinent part:

"Official acceptance occurs, almost invariably, after the improvements, i.e., streets, gutters, etc., are completed by the contractor. At this time, another resolution is filed indicating the acceptance of both the

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right-of-way and improvements in the city/
county road system. . . .

". . . .

"This is the key document that establishes the date the street area becomes exempt from taxation. Because of the sequence of events, the street improvements as well as all lot improvements remain taxable to the developer until the second resolution is filed."
[Emphasis added.]

WE THEREFORE CONCLUDE THAT LETTER 84/51 IS A "REGULATION" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

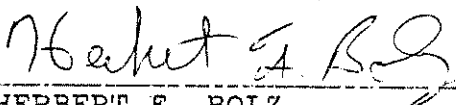
SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

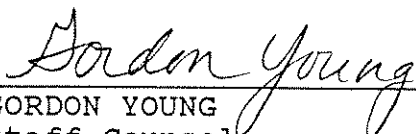
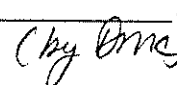
Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.¹⁸ None of the recognized exceptions (enumerated in the preceding footnote) apply to Letter 84/51.¹⁹

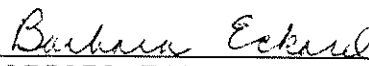
III. CONCLUSION

For the reasons set forth above, OAL finds that the Board's Letter 84/51 (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

DATE: May 25, 1988


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- 1 This Request for Determination was filed by Richard P. Simpson, Executive Vice President, California Taxpayers' Association (Cal-Tax), 921 11th Street, Suite 800, Sacramento, CA 95814, (916) 441-0490. The State Board of Equalization was represented by Cindy Rambo, Executive Director, and Larry A. Augusta, Assistant Chief Counsel, 1020 N Street, Sacramento, CA 95808, (916) 485-6464.
- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute. In Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 244 Cal.Rptr. 693 (Cal.App. 2nd Dist.), the court found that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism."

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

- 4 A copy of the State Board of Equalization's County Assessors Letter No. 84/51 ("Valuation of Subdivision Lots") is attached to this Determination as Appendix A.

- 5 Government Code Section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

- (1). File its determination upon issuance with the Secretary of State.
- (2). Make its determination known to the agency, the Governor, and the Legislature.
- (3). Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

- (4). Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

- (1). The court or administrative agency proceeding involves the party that sought the determination from the office.
- (2). The proceeding began prior to the party's request for the office's determination.
- (3). At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

6 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Regulatory Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

7 One comment was received from Mark G. Ancel concerning this Request. Mr. Ancel supported the position of Cal-Tax. Mr. Ancel's comments were considered in making this Determination. The Board did not file a response. (See note 15, infra.)

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected rulemaking agencies to submit responses to requests. If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation, it would be helpful", if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

- 8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Gov. Code, sec. 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
- 9 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on p.1.
- 10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 11 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the CCR, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 12 Government Code section 11342, subdivision (a). See Government Code sections 11343 and 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
- 13 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 14 State Board of Equalization Letter No. 84/51, page 1.
- 15 On May 8, 1988, OAL was notified in writing that the Board had "elected not to make a formal response to the subject request The issue which is addressed in Letter to Assessors 84/51 is the subject of a pending regulation, Rule 463.1, which is scheduled for public hearing before the Board on July 26, 1988. The adoption of Rule 463.1 would make the issue raised in the request a moot question."
- 16 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 17 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

18 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly

Index of OAL Regulatory Determinations is a helpful guide for locating such information. The Determination Index, as well as an order form for purchasing copies of individual determinations, is available from OAL, 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request.

- 19 We previously considered the issue of whether the APA exception for "legal rulings of counsel" set forth in Government Code section 11342, subdivision(b) applied to the Board's County Assessors Letter No. 82/89 ("Easements of Intercounty Pipelines") See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004; typewritten version, pages 4-6), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-26--B-28. In that Determination, we found that the legal rulings of counsel exception did not apply to the Board's County Assessors Letter No. 82/89 because it failed to satisfy each element of a four-part test. Those elements were:

"[A] 'legal ruling of counsel' has the following characteristics:

- (a) It is signed by a Board attorney;
- (b) It is initially directed to a specific person and answers a specific legal question concerning tax liability in a particular factual context;
- (c) It is summarized in the annotation volume of the Property Tax Law Guide and is labelled 'C' for 'staff correspondence.'
- (d) Copies with the original addressee's name and other identifying data deleted are made available upon request to other interested persons."

The Letter currently under review similarly meets none of the four criteria. Thus, the "rulings of counsel" exception does not exempt Letter 85/41 from APA rulemaking requirements.